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No. 07-1116

Supreme Court, U.S.
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In The

Supreme Court of the United States

FIDEL CINTORA AGUILAR,

Petitioner,

v.

MICHAEL J. MUKASEY,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the elimination of section 212(c) of the Immigration and Nationality Act (INA) has an impermissible retroactive effect on lawful permanent residents who were found guilty of a deportable offense after a jury trial prior to the provision's repeal?

2. Whether Congress's expansion of the definition of "conviction" in INA § 101(a)(48), as retroactively applied to the Petitioner, violates the Due Process Clause of the Fifth Amendment when the Petitioner gave up his right to appeal an adverse jury verdict in reliance on the old definition of "conviction"?

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OPINION BELOW

The Immigration Judge (IJ) determined that the definition of conviction found in INA § 101(a)(48) applied to Cintora and determined that he was ineligible to apply for relief under repealed INA § 212(c) in an unpublished decision dated April 13, 2007. The Board of Immigration Appeals (BIA) affirmed the IJ's decision in an unpublished decision dated July 11, 2007. The Fifth Circuit Court of Appeals summarily affirmed the BIA in an unpublished decision dated October 2, 2007. The Court of Appeals denied Cintora's Petition for Rehearing En Banc in an unpublished decision dated November 28, 2007. These opinions are located in the appendix.

JURISDICTION

On October 2, 2007, the Fifth Circuit Court of Appeals filed its opinion summarily affirming the BIA's decision ordering Cintora's removal. On November 28, 2007, the Fifth Circuit denied the Petitioner's timely Petition for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

– The Due Process Clause of the Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATUTORY PROVISIONS INVOLVED

– 8 U.S.C. § 1182(c), section 212(c) of the Immigration and Nationality Act

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years."

Section 212(c) was initially only applicable to exclusion proceedings. The BIA later extended its availability to lawful permanent residents in deportation proceedings. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001), *citing Matter of Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976). This Court succinctly stated the legislative history of § 212(c):

> In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years. § 511, 104 Stat. 5052 (amending 8 U.S.C. § 1182(c)). In 1996, in § 440(d) of AEDPA, Congress identified a broad set of offenses for which convictions would preclude such relief. See 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). And finally, that same year, Congress passed IIRIRA. That statute, *inter alia*, repealed § 212(c), see § 304(b), 110 Stat. 3009-597. . . .

Id.

– 8 U.S.C. § 1101(a)(48), section 101(a)(48) of the Immigration and Nationality Act:

> The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a plea of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

This provision was added to the INA by § 322(a)(1) of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In § 322(c), Congress

stated that this provision should be applied retroactively.

STATEMENT OF THE CASE

Fidel Cintora Aguilar, a citizen and national of Mexico, became a lawful permanent resident of the United States on or around May 4, 1987. His wife and two minor children reside in the United States as lawful permanent residents. On November 1, 1993, Cintora was charged in Blaine County, Idaho, with one count of rape and one count of lewd and lascivious acts with a minor under the age of sixteen. He pled not guilty to both counts. On February 2, 1994, a jury acquitted Cintora of rape, but found him guilty of committing lewd and lascivious acts with a minor. After the jury verdict, the criminal case was adjourned for sentencing.

Realizing that the jury's guilty verdict placed Cintora's immigration status in jeopardy, his attorney, Kathleen Rivers, consulted an immigration attorney about how to structure Cintora's sentence in a manner to avoid his deportation. App. at 15. She was informed that if Cintora received an "Order Withholding Judgment" he would not be subject to deportation. An "Order Withholding Judgment" is a procedure under Idaho law where a defendant is found guilty of the offense, but the court withholds a formal finding of guilt to allow the defendant to complete a term of probation. Idaho Code Ann. § 19-2601(3)

(2007). Once the term of probation is completed, the court dismisses the charge and the Defendant is not convicted. App. at 15. Prior to the passage of the IIRIRA, an "Order Withholding Judgment" was not considered a "conviction" for immigration purposes. *See Matter of Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988), *superseded by statute*, 8 U.S.C. § 1101(a)(48).

Relying on the pre-IIRIRA definition of conviction, Rivers advised Cintora to accept an "Order Withholding Judgment" because such an order would prevent his deportation. By pursuing an "Order Withholding Judgment," Cintora was forced to give up his right to appeal the jury's verdict, his right to have his sentence reconsidered, and his right to pursue post-conviction relief. App. at 16. Losing his appellate rights was especially important in Cintora's case because there was a "significant appealable issue." App. at 16. Rivers filed a preliminary motion to dismiss the charges against Cintora claiming the State of Idaho was practicing "selective prosecution on the basis of race and ethnic discrimination." App. at 16. An Anglo individual who committed a similar offense around the same time was not prosecuted by the State of Idaho while Cintora, a Mexican, was. By accepting the terms of the "Order Withholding Judgment," Cintora waived his right to appeal the trial judge's order denying this motion and every other issue. He thereby waived his last chance to be exonerated.

The sole reason Cintora waived his right to appeal and forsook the opportunity to be exonerated

was because he believed that by accepting an "Order Withholding Judgment" he would not be deported. This was likely confirmed to Rivers by immigration officials. App. at 15. It was Rivers' "practice to not simply accept the representations of one person on such an important issue and to instead, confirm the information with immigration." App. at 16. Rivers advised Cintora to pursue an "Order Withholding Judgment" because she believed that it would not result in his deportation. Cintora, trusting in his attorney, waived his right to appeal and instructed Rivers to pursue an "Order Withholding Judgment." App. at 18.

On March 28, 1994, the Idaho Criminal Court considered and granted Cintora's request for an "Order Withholding Judgment." Cintora was placed on probation for five years and upon completion of the term of probation the charge against him was to be dismissed. The court's order completed a *quid pro quo* arrangement between Cintora and the State of Idaho. Cintora accepted an "Order Withholding Judgment" and forsook his appeal rights; the State of Idaho, in return, accepted the Order and did not have to expend prosecutorial resources litigating an appeal.

Convinced that he would be allowed to reside in the United States permanently, Cintora filed a visa petition naming his spouse as the beneficiary on September 27, 1996. Believing that Cintora was able to permanently reside in the United States, his spouse and two minor daughters immigrated to this country. They left their home, school, and friends in

Mexico in favor of a lifetime in the United States with Cintora.

In 1996, Congress passed immigration legislation which greatly altered Cintora's immigration status and dramatically upset the terms of his *quid pro quo* arrangement. First, Congress changed the definition of "conviction" and superseded the BIA's decision in *Ozkok*. Congress's new definition of "conviction" includes the "Order Withholding Judgment" Cintora received. Congress also expressly made the new definition of "conviction" retroactive, *see* IIRIRA § 322(c), causing Cintora's 1994 "Order Withholding Judgment" to be considered a "conviction" for immigration purposes. Second, Congress eliminated § 212(c) – which contained the only defense to deportation available to Cintora. Therefore, the immigration laws passed in 1996 caused Cintora to move from a lawful permanent resident, residing lawfully with his family in this country, and on the path to becoming a United States citizen, to an alien subject to certain removal without recourse to any defense.

In 2001, this Court determined that the elimination of § 212(c) had an impermissible retroactive effect on aliens who pled guilty or nolo contendere to a deportable offense prior to the passage of the IIRIRA. *INS v. St. Cyr*, 533 U.S. 289 (2001). The Court did not, however, consider whether the elimination of § 212(c) relief has an impermissible retroactive effect on aliens found guilty of an offense by a jury. The circuit courts that have considered the issue have reached different conclusions. The Fifth Circuit

Court of Appeals, the appellate court with jurisdiction in this case, has determined that the repeal of § 212(c) has an impermissible retroactive effect only when the alien found guilty by a jury can show that he or she "actually relied" upon the provision. *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007).

On January 17, 2007, Cintora was arrested by officers of the Department of Homeland Security (DHS) at a port of entry in Texas when he was returning to the United States after a brief trip to Mexico. The government charged that Cintora was inadmissible to the United States as an alien convicted of a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(I)(i). Before the IJ, Cintora contended that he was not inadmissible because the retroactive application of the definition of "conviction" to him violated his due process rights. He also argued that he qualifies for relief under § 212(c) because the provision's elimination had an impermissible retroactive effect. The IJ rejected these arguments and ordered Cintora removed to Mexico. Cintora appealed. The BIA affirmed the IJ's decision on July 11, 2007. Cintora timely petitioned the Fifth Circuit for review. Relying on *Carranza de Salinas* and *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (ruling that Congress intended for the IIRIRA's definition of "conviction" to apply retroactively), the government moved the court to summarily affirm the BIA's decision. Over Cintora's opposition, the court granted the

government's motion. Cintora petitioned for rehearing en banc, which was also denied. This petition now follows.

REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition for the reasons stated in Supreme Court Rule 10, subsections (a) and (c).

I. Question One: The impermissible retroactive application of the repeal of INA § 212(c).

A. Conflict with Supreme Court Law

This Court has already ruled that the elimination of a defense – available to a defendant at the time when the transactions or considerations giving rise to the cause of action occurred – attaches a "new disability" to transactions already past and, as such, has an impermissible retroactive effect. *Hughes Aircraft Co. v. United States ex rel. Shumer*, 520 U.S. 939 (1997). The lower courts refusal to recognize the impermissible retroactive effect of the elimination of § 212(c) directly contradicts this Court's ruling in *Hughes Aircraft*. This Court also has ruled that settled expectations based on settled law as determined in a *quid pro quo* agreement between the prosecution and the defendant are protected from retroactive legislation. *INS v. St. Cyr,* 533 U.S. 289 (2001). Given that Cintora entered into a *quid pro quo* arrangement which is substantively indistinguishable from the one

confronted by the Court in *St. Cyr*, the Court of Appeals' requirement that Cintora show *actual reliance* on the pre-IIRIRA law is unacceptable. Finally, the requirement that an applicant demonstrate "actual reliance" upon § 212(c) fails to recognize the presumption against retroactive application of laws, and Supreme Court case law strongly suggests that actual reliance is simply not a relevant part of the analysis in determining whether a law has an impermissible retroactive effect.

B. Circuit Split

The circuit courts are in "considerable disagreement" whether the repeal of § 212(c) has an impermissible retroactive effect on immigrants who elected to go to trial prior to the IIRIRA instead of entering into a plea arrangement. *See Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007) (recognizing the split). The split between the circuits generally revolves around whether reliance is the *sine qua non* of the retroactive effect analysis and, if so, whether objective reliance or "actual reliance" must be shown. The Third Circuit Court of Appeals, in deciding that the repeal of § 212(c) does have a retroactive effect on individuals found guilty after a jury trial, ruled that reliance is just one factor among many to be considered. *Atkinson v. Att'y Gen. of the U.S.*, 479 F.3d 222, 231 (3d Cir. 2007); *accord Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). The Tenth Circuit Court of Appeals decided that a showing of objective "reasonable reliance" by an identified class

must be demonstrated in order to establish that the elimination of § 212(c) has an impermissible retroactive effect. *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006). The Fifth Circuit, the court with jurisdiction in this case, and the Second Circuit require a showing that the person "actually relied" upon § 212(c) in order to demonstrate that the repeal has an impermissible retroactive effect. *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007); *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). Three other circuits have decided that the repeal of § 212(c) does not have a retroactive effect on individuals who elected to have a trial instead of accepting a plea arrangement. *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); and *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002).

II. Question Two: The change in the definition of "conviction" violated Cintora's due process rights because he gave up his right to appeal the jury's verdict based upon the pre-IIRIRA definition of "conviction."

ARGUMENT

I. Introduction

Retroactive laws are disfavored because they are "generally unjust; and, as has been forcibly said,

neither accord with sound legislation nor with the fundamental principles of the social compact." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998) (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)). Therefore, "[r]etroactive statutes raise special concerns." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'

Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). For the above reasons, the Court applies a "presumption against retroactive legislation [which] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265; *see also Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422, 2428 (2006); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *Martin v. Hadix*, 527 U.S. 343, 352 (1999); *Hughes Aircraft Co. v. Shumer*, 520 U.S. 939, 946 (1997).

The Court applies a two-part analysis to determine whether a law is impermissibly retroactive. *Fernandez-Vargas*, 126 S.Ct. at 2428. First, the Court

should attempt to ascertain whether Congress clearly intended for the statute to apply retroactively. *Id.* If not, the second step is to determine whether the statute has an impermissible retroactive effect. *Id.* If Congress did not clearly manifest its intent for the law to apply retroactively, and the law does have an impermissible retroactive effect, the Court will apply the presumption against retroactive application of the law. *Id.*

The Court in *St. Cyr* has already determined that Congress did not clearly manifest an intention for its elimination of § 212(c) to apply retroactively. *St. Cyr,* 533 U.S. at 320. *St. Cyr* decided that the elimination of § 212(c) had an impermissible retroactive effect on aliens who entered into a plea agreement. Cintora contends that the repeal of § 212(c) also has an impermissible retroactive effect upon lawful permanent residents found guilty after a jury trial. Moreover, although Congress did intend for the definition of "conviction" to be applied retroactively, the application of the new definition to Cintora results in a manifest injustice and accordingly violates the Due Process Clause of the Fifth Amendment.

II. The elimination of § 212(c) has an impermissible retroactive effect on lawful permanent residents who were found guilty of an offense after a jury trial.

"The inquiry into whether a statute operates retroactively demands a commonsense, functional

judgment about whether the new provision attached new legal consequences to events completed before its enactment." *St. Cyr,* 533 U.S. at 321. "A statute has retroactive effect when it 'it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . .'" *Id.* In its analysis, the Court "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.*, citing *Martin,* 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270).

The repeal of INA § 212(c) has an impermissible retroactive effect on Cintora for at least the following reasons. One, it imposes a "new disability" upon Cintora insofar as it removed a defense for which he previously qualified. Two, the repeal of § 212(c) significantly upset Cintora's "settled expectations" determined in a *quid pro quo* arrangement he entered into with the State of Idaho in which he forsook his appellate rights in return for the assurance that he would not be deported. Finally, the lower courts insistence that Cintora show "actual reliance" upon the repealed provision is inappropriate because it (a) nullifies the presumption against applying laws retroactively and (b) actual reliance is not a relevant consideration to the determination of whether a law has an impermissible retroactive effect; rather this Court has favored a showing of objective reasonable reliance which affects a class of people.

A. The repeal of § 212(c) has an impermissible retroactive effect because it imposed a "new disability" on Cintora by removing a defense for which he previously qualified.

In *Hughes Aircraft*, this Court held that the elimination of certain defenses to *qui tam* suits under the False Claims Act (FCA) could not be applied retroactively. Schumer sued Hughes Aircraft in 1989 under the *qui tam* provision of the FCA alleging that Hughes Aircraft submitted false claims to the government between 1982 and 1984.

> Prior to 1986, such suits were barred if the information on which they were based was already in the Government's possession. At issue in [*Hughes Aircraft Co.* was] whether a 1986 amendment to the FCA partially removing that bar applie[d] retroactively to *qui tam* suits regarding allegedly false claims submitted prior to its enactment. . . .

Id. at 941. A 1986 amendment to the FCA effectively removed "prior disclosure" to the government of a false claim as a defense to a *qui tam* suit. This defense was available to Hughes Aircraft in 1982 through 1984, the time when the alleged false claims occurred. In ruling that the application of the 1986 amendment to the FCA would have an impermissible retroactive effect on Hughes Aircraft, the Court stated:

> [T]he 1986 amendment eliminates a defense to a *qui tam* suit . . . and therefore changes

> the substance of the existing cause of action for *qui tam* defendants by "attach[ing] a new disability, in respect to transactions or considerations already past."

Id. at 948.

Similarly, Congress's 1996 amendments to the INA "eliminate[] a defense to [removal] . . . and therefore change[] the substance of the existing cause of action for [aliens in a removal proceeding] by 'attaching a new disability, in respect to transactions or considerations already past.'" *Id.* Like the defendant in *Hughes Aircraft*, Cintora lost a defense previously available to him on account of retroactive legislation. *Hughes Aircraft* decided that such a retroactive removal of a defense to a litigant in a civil proceeding attaches a new disability to transactions already past and, therefore, has an impermissible retroactive effect. The Court should apply its holding in *Hughes Aircraft* to find that the elimination of § 212(c) does have a retroactive effect in Cintora's case.

B. The retroactive elimination of INA § 212(c) is impermissible because it upsets Cintora's settled expectations on settled law, which were determined in a *quid pro quo* agreement he entered into with the State of Idaho.

In reaching its conclusion that the repeal of § 212(c) had an impermissible retroactive effect on

aliens who entered into a plea agreement, *St. Cyr* focused upon the *quid quo pro* arrangement involved in a plea bargain.

> Plea agreements involve a *quid pro quo* between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous 'tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.' There can be little doubt that alien defendants considering whether to enter a plea agreement are acutely aware of the immigration consequences of their convictions.

St. Cyr, 533 U.S. at 321-322. It was the *quid pro quo* arrangement – not the actual plea of guilty – which caused the repeal of § 212(c) to have an impermissible retroactive effect in *St. Cyr.* The repeal of § 212(c) likewise has an impermissible retroactive effect on Cintora, even though he was found guilty by a jury, because he also entered into a *quid pro quo* agreement in which it was determined – based on settled law – that he would not be deported if he forsook his right to appeal.

There is no substantive difference between the *quid pro quo* arrangement in *St. Cyr* and Cintora's. Where St. Cyr gave up his right for a trial, Cintora gave up his right to appeal the jury's verdict. The government in St. Cyr's case did not need to expend

its resources in a trial; in Cintora's case, the government did not need to expend resources in an appeal. Both St. Cyr and Cintora entered their respective *quid pro quo* arrangements in order to avoid deportation. As such, this Court's decision in *St. Cyr* is directly on point and makes certain that the repeal of § 212(c) has an impermissible retroactive effect on Cintora.

The fact that Cintora's *quid pro quo* arrangement was post-jury verdict instead of as part of a plea bargain is wholly irrelevant because Cintora, like St. Cyr, made a calculated decision – based upon settled law – to waive his appellate rights in order to avoid deportation. This is the precise type of calculation that St. Cyr engaged in, and, furthermore, is the precise type of *quid pro quo* arrangement which the Supreme Court ruled in *St. Cyr* would be protected from the retroactive application of the repeal of § 212(c). *See, e.g., Hem*, 458 F.3d at 1200, n. 5 ("There is no basis for distinguishing between a decision to give up a right to trial in favor of the possibility of immigration relief and a decision to forego the right to appeal in favor of such a possibility."). The Court should protect Cintora's reliance interest determined in his *quid pro quo* arrangement in the same way it protected St. Cyr's; it should rule that the elimination of § 212(c) does have an impermissible retroactive effect to lawful permanent residents found guilty of an offense by a jury trial prior to the 1996 amendments.

C. The lower courts' insistence that Cintora show "actual reliance" on § 212(c) before applying the presumption against retroactive application of laws nullifies the presumption and is not supported by this Court's precedent.

All of the lower courts' decisions in Cintora's case are premised upon the Fifth Circuit Court of Appeals' decisions in *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006) and *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). In these cases, the Fifth Circuit determined that the repeal of INA § 212(c) only has an impermissible retroactive effect upon aliens found guilty after a trial when the alien can demonstrate that he or she "actually relied" upon the repealed provision. This rule not only increases the burden upon the trier of fact to determine whether an individual actually relied upon the repealed provision, it also (1) fails to apply the presumption against retroactive laws; (2) is wholly unsupported by this Court's precedent; and (3) misunderstands the Court's previous holdings which hold that objective reliance – never actual reliance – is a factor to consider when determining if a law has an impermissible retroactive effect.

1. By requiring an applicant to demonstrate "actual reliance" upon § 212(c), the lower courts fail to apply the presumption against retroactive laws.

Landgraf and its progeny make clear that the presumption against retroactive laws "informs every step of the *Landgraf* inquiry." *Hem*, 458 F.3d at 1196. By requiring the applicant to demonstrate "actual reliance" on the prior law, however, the lower courts are effectively presuming that the law *does* apply retroactively and are placing the burden of proof on the individual applicant to demonstrate that he or she did, in fact, "actually rely" on the prior law. *See, e.g.*, *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) ("This has the effect of treating *Landgraf* as establishing a presumption *in favor* of retroactive application. . . ."); *Hem*, 458 F.3d at 1196 (Stating that to require *actual reliance* on the pre-IIRIRA law "turns the presumption against retroactivity on its head by demanding that petitioners 'point[ ] to . . . conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial' ") citing, *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003)). To require aliens to demonstrate that they relied upon the pre-IIRIRA law places the burden of demonstrating the retroactive application of § 212(c) on the applicant, instead of presuming the law does not apply retroactively. "It is a strange 'presumption,' in our view, that arises only on so heightened a showing as actual reliance." *Ponnapula*, 373 F.3d at 491.

2. Whether an individual "actually relied" upon a repealed provision is not a relevant consideration to determining whether the law has an impermissible retroactive effect.

In finding that the elimination of defenses to *qui tam* suits attached a new disability to completed transactions, the Court in *Hughes Aircraft* did so "without even a single word or discussion as to whether Hughes Aircraft . . . had relied on the eliminated defense to its detriment." *Olatunji v. Ashcroft*, 387 F.3d 383, 391 (4th Cir. 2004). Like the 1986 amendment to the FCA repealed a defense to a *qui tam* suit, the IIRIRA of 1996 removed an important defense to deportation – § 212(c). There is absolutely no reason why aliens in a removal proceeding should have to show actual reliance upon the existence of § 212(c), while defendants in a *qui tam* suit do not have to show actual reliance upon the pre-1986 defenses to a *qui tam* suit. *Hughes Aircraft*, as such, makes certain that the Supreme Court does not require a showing of *actual reliance* upon the prior law in order to demonstrate an impermissible retroactive effect. In fact, no Supreme Court precedent supports the rule that an alien must show *actual reliance* on § 212(c) in order to demonstrate the repeal's retroactive effect. *See Atkinson v. Att'y Gen. of the U.S.*, 479 F.3d 222, 227-228 (3d Cir. 2007) ("[t]he Supreme Court has never held that reliance on the prior law is an element required to make the determination that a statute be applied retroactively."). Reliance, whether objective or subjective, is at most one of many factors to consider when

the Court is confronted with a claim that a statute has an impermissible retroactive effect; it is not the "*sine qua non* of the retroactive effects inquiry." *Atkinson*, 479 F.3d at 231.

3. "Objective reliance" – as opposed to "subjective reliance" – on the prior law is a relevant factor to the determination of whether the new legislation has an impermissible retroactive effect.

Following *Martin* and *St. Cyr*, the Tenth Circuit Court of Appeals rejected the rule demanding petitioners demonstrate "actual reliance" and instead requires a showing of "objective reliance." *Hem*, 458 F.3d at 1197. The court provided three reasons to hold that reasonable reliance, as opposed to "actual reliance," is sufficient to "sustain a retroactivity claim":

> First, this rule is more directly tied to the basic aim of retroactivity analysis: in determining whether it is appropriate to presume Congress concluded that the benefits of a new law did not warrant disturbance of interests existing under prior law, it makes sense to look at the objective group-based interests that Congress could practically have assessed ex ante. Second, this rule is consistent with the Supreme Court's analyses in *Landgraf* and its progeny, none of which required actual reliance. Third, and most immediately pertinent here, the objective approach is consistent with the actual holding in *St. Cyr* – the Court's most reliance-focused decision – which

> precluded retroactive application of IIRIRA's elimination of § 212(c) eligibility to all aliens who reasonably could have relied on prior law when pleading guilty, rather than to just those aliens who actually did so rely.

Id. at 1197; *see also Hernandez de Anderson*, 497 F.3d at 940 (finding *Hem*'s three reasons to be persuasive).

Under an "objective reliance" approach, the court must "identify the class of persons whose objective reliance interests prior to the repeal of § 212(c) should be analyzed." *Hem*, 458 F.3d at 1199. *Hem* identified the following class: "Aliens who gave up their right to appeal their aggravated felony conviction when a successful appeal could have deprived them of § 212(c) eligibility." *Id.* Individuals in this class chose not to appeal because the results of the appeal could have disrupted their eligibility for § 212(c). *Hem* concluded that the repeal of § 212(c) has an impermissible retroactive effect on this class of people. *Id.* at 1201.

Cintora, of course, is a member of the class identified in *Hem*. Cintora, like Hem, gave up his right to appeal. Had Cintora appealed, he not only would have been unable to accept an "Order Withholding Judgment," he could have been sentenced to a period of incarceration exceeding five years for his felony conviction, thereby losing his eligibility for § 212(c) relief. Cintora, like Hem, could have lost his eligibility for § 212(c) relief had he appealed. The elimination of § 212(c), therefore, to individuals like Cintora and Hem has an impermissible retroactive effect.

III. Applying the IIRIRA's definition of "conviction" to Cintora violates the Due Process Clause of the United States Constitution because it resulted in a manifest injustice.

Before the passage of the IIRIRA, the term "conviction" was judicially defined. When judgment was withheld in a criminal proceeding, the BIA developed a three-pronged test to determine whether the offense constituted a conviction: (1) a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or nolo contendere or admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed; and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge. *Matter of Ozkok*, 19 I. & N. Dec. 546, 551-52 (B.I.A. 1988), *superseded by statute*, 8 U.S.C. § 1101(a)(48)(A). Relying on this definition, Cintora forsook his right to appeal and accepted an "Order Withholding Judgment" under Idaho law with the assurance that it would not result in his deportation. In 1996, Congress passed the IIRIRA and changed the definition of conviction. The new definition specifically includes Cintora's "Order Withholding Judgment." Congress also clearly manifested its intent for this provision to apply retroactively. IIRIRA § 322(c) ("Effective Date – The amendments made by subsection (a) shall apply

to convictions and sentences before, on, or after the date of the enactment of this Act . . . ").

"Despite the dangers inherent in retroactive legislation, it is beyond dispute that, *within constitutional limits*, Congress has the power to enact laws with retrospective effect." *St. Cyr*, 533 U.S. at 316 (emphasis added). The retroactive application of the new law, however, "must meet the test of due process. . . ." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *cf. Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (a lawful permanent resident is entitled to due process of law). A law which Congress intends to be applied retroactively violates due process of law if it causes a "manifest injustice." *See Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 716 (1974); *Jideonwo v. INS*, 224 F.3d 692, 697 (7th Cir. 2000).

A "[m]anifest injustice may occur where a new law changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice." *Jideonwo*, 224 F.3d at 697. In *Jideonwo*, the Seventh Circuit determined that the petitioner had a cognizable due process claim when Congress retroactively removed a defense to removal previously available to him. *Id.* Jideonwo pled guilty to an offense in return for a sentence of less than five years in order to maintain his eligibility for relief under § 212(c) in a future deportation proceeding. When Congress repealed § 212(c), Jideonwo's expectations determined in the plea arrangement were dramatically upended,

causing a manifest injustice, which violated the Due Process Clause.

It is indisputable that the retroactive application of the definition of "conviction" changed Cintora's existing rights without notice. Like Jideonwo relied on the pre-IIRIRA law to structure his plea arrangement, Cintora relied upon the pre-1996 definition of "conviction" to structure his sentencing. Cintora forsook his right to appeal the jury's guilty verdict in reliance upon the pre-IIRIRA definition of "conviction." Giving up appellate rights is always significant, but it was particularly so in Cintora's case because he had a "significant appealable issue" alleging "selective prosecution" by the State of Idaho. App. at 16. The sole reason he forsook his right to appeal was because he was assured that an "Order Withholding Judgment" would not result in his deportation. If the pre-1996 law were otherwise, and he knew that he would be deported for this offense, he certainly would have appealed and attempted to exonerate himself. The changing of the definition of "conviction" to make Cintora subject to removal after he gave up his right to appeal in reliance on the old definition is "manifestly unjust."

The treatment of Cintora invokes the Supreme Court's concerns with retroactive application of laws:

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use

> retroactive legislation as a means of retribution against unpopular groups or individuals."

Landgraf, 511 U.S. at 266. In this instance, Congress used its "unmatched power" to legislate retroactive laws affecting an immigrant found guilty of a sex offense – it targeted an unpopular group. This case represents an instance where Congress clearly has acted outside the limits of the Constitution and, in so doing, has violated Cintora's right to due process.

CONCLUSION

The retroactive definition of "conviction" as applied to Cintora violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution. The Court should accordingly vacate the lower courts decisions. Alternatively, the repeal of § 212(c) does have an impermissible retroactive effect on Cintora. The Court should vacate the lower courts' decisions and remand Cintora's case for a new hearing to be held to consider his application for relief under § 212(c).

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60546

FIDEL CINTORA AGUILAR

Petitioner

v.

PETER D KEISLER,
ACTING US ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Oct. 2, 2007)

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's motion for summary affirmance is GRANTED.

MOT-21A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: JUL 11 2007

File: A90 791 836 – San Antonio, TX

In re: FIDEL *CINTORA* AGUILAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lance E. Curtright, Esquire

ON BEHALF OF DHS: Christina Playton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude

APPLICATION: Termination; former section 212(c) waiver of inadmissibility

ORDER:

PER CURIAM. The appeal is dismissed.[1] We affirm the Immigration Judge's April 13, 2007, decision finding the respondent removable as charged and ineligible for relief for removal. Specifically, we

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[1] The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7) (2007).

find no legal error in the Immigration Judge's determination that the respondent's 1994 withheld judgment, which the respondent accepted after a jury's finding of guilt in the respondent's felony trial for lewd and lascivious conduct with a child under the age of 16 in violation of Idaho law, constitutes a conviction for immigration purposes. *See Madriz-Alvarado v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004); *see also Matter of Punu*, 22 I&N Dec. 224 (BIA 1998). In addition, as the Immigration Judge correctly noted, the respondent's argument that application of the definition of conviction added to the Immigration and Nationality Act by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is impermissibly retroactive is foreclosed by the Fifth Circuit's holdings to the contrary in *Madriz-Alvarado v. Ashcroft, supra*, and *Moosa v. INS*, 171 F.3d 994, 1009-10 (5th Cir. 1999). Moreover, the Board is not empowered to rule on the constitutionality of the statutes and regulations that we administer. *See Matter of Valdovinos*, 18 I&N Dec. 343, 345 (BIA 1982). To the extent the respondent asserts that the Department of Homeland Security ("DHS") unfairly initiated removal proceedings against him, the respondent's argument is without merit. Despite any assurances that the DHS may or may not have advanced, the DHS maintains prosecutorial discretion. Furthermore, we will not review the decision of the DHS to institute proceedings. *See Matter of Bahta*, 22 I&N Dec. 1381, 1391-92 (BIA 2000).

Finally, we agree with the Immigration Judge that the respondent is ineligible for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). As the Immigration Judge noted, that the respondent decided to waive his right to appeal to avoid the consequences of having a conviction for immigration purposes does not demonstrate the requisite reliance on the continued availability of section 212(c) relief. Nor does it demonstrate that the respondent actively engaged in conduct that reflected an intention to preserve his eligibility for such relief. *See Carranza-DeSalinas*, 477 F.3d 200 (5th Cir. 2007). As such, the respondent is ineligible for relief under former section 212(c) of the Act.

On the whole, the record supports the Immigration Judge's resolution. Accordingly, the appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

IN THE MATTER OF	)	
FIDEL CINTORA AGUILAR	)	Case Number:
RESPONDENT	)	A90-791-836
IN REMOVAL PROCEEDINGS	)	

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended: alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of, a crime involving moral turpitude.

APPLICATIONS: Motion to Reconsider and Terminate Proceedings.

Section 212(c) of the Immigration and Nationality Act (now repealed): waiver of inadmissibility.

ON BEHALF OF RESPONDENT
Lance E. Curtright, Esq.
De Mott, McChesney, Curtright & Associates, LLP
800 Dolorosa, Suite 100
San Antonio, TX 78207

ON BEHALF OF THE GOVERNMENT
Assistant Chief Counsel
P.O. Box 1939
San Antonio, TX 78297

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a native and citizen of Mexico who was admitted to the United States as a resident alien on December 1, 1990. Exhibit 1. On January 15, 2007 the respondent arrived at the Del Rio, Texas port of entry from Mexico and applied for admission as a resident alien. He was paroled into the country on January 16, 2007 pending removal proceedings. On January 19, 2007, the Department of Homeland Security (DHS) personally served the respondent with a Notice to Appear (NTA) charging him with being removable from the United States as an alien who has been convicted of a crime involving moral turpitude. At a master hearing on March 1, 2007, the respondent denied that he had been convicted of the offense of "lewd and lascivious conduct with a child under sixteen years of age" in violation of Idaho law. Idaho Code Ann. § 18-1508. He also denied the charge of removability. To prove the allegation and sustain its burden of proving the charge of removability by clear and convincing evidence, the government introduced

the respondent's record of conviction. Group Exhibit 2. Based on the evidence submitted, the Court found that the respondent is removable as charged. The respondent has filed a motion asking the Court to reconsider its finding that the respondent has been convicted of a crime involving moral turpitude, and requesting termination of proceedings. In the alternative, the respondent seeks a waiver of his ground of removal pursuant to former section 212(c) of the Act. DHS is opposed to the respondent's motion to terminate proceedings and to the application for section 212(c) relief. Both parties have filed briefs in support of their positions.

II. Motion to Terminate Proceedings

The record of conviction reflects that the conduct for which the respondent was convicted was sexual intercourse with a fourteen year old minor and that it was committed "willfully and lewdly" with intent to appeal to or gratify the sexual desire of the defendant. "Moral turpitude" generally refers to conduct that shocks the conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. It has been said that it is the nature of the act and not the statutory prohibition of it that renders a crime one of moral turpitude. *Matter of Fualaau* 21 I&N Dec. 475 (BIA 1996). I find that the offense in this case involving sexual contact with a minor is a crime involving moral turpitude. See

generally *Matter of Dingena* 11 I&N Dec. 723 (BIA 1966) and cases cited therein.

The respondent also argues that removal proceedings should be terminated because the retroactive application of the definition of "conviction", added to the Act by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), to the respondent's 1994 "withheld judgment" under Idaho law, is manifestly unjust and violative of due process. *See* IIRIRA Division C of Pub. L. No. 104-208, § 322, 110 Stat. 3009, 628-29. According to the respondent, he waived his constitutional right to appeal a jury's finding of guilt in his 1994 trial for "lewd and lascivious conduct with a child under sixteen years of age" because of advice from counsel that acceptance of a "withheld judgment" would insulate him from deportation, as the "withheld judgment" would not be considered a "conviction" for immigration purposes. *See Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); Idaho Code Ann. § 19-2603. The respondent asks the Court to terminate proceedings because the retroactive application of the "conviction" definition to the respondent is "manifestly unjust", violative of due process, and therefore unconstitutional.

As the respondent himself acknowledged, Congress clearly stated that the definition of "conviction" was to be applied retroactively. *See* IIRIRA, Pub. L. No. 104-208, § 322(c), 110 Stat. 3009, 628-29; *Moosa v. INS*, 171 F.3d 994, 1006-07 (5th Cir. 1999). Because Congress has made its intent clear, the Court need not look further, and the second prong of the

Landgraf retroactivity analysis is not needed. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). To the extent that the respondent claims that Congress has acted unconstitutionally, this Court has no power to so hold. *See Matter of U-M-*, 20 I&N Dec. 327, 334 (BIA 1991). Moreover, the respondent's constitutional argument has already been rejected by the Fifth Circuit Court of Appeals. *See Moosa*, 171 F.3d at 1009-10. See also *Madriz-Alvarado v Ashcroft* 783 F. 3d 321 (5th Cir. 2004). Accordingly, the respondent's motion to reconsider and terminate proceedings will be denied.

III. Waiver of Inadmissibility under former INA § 212(c)

In the alternative, the respondent argues that he is eligible for relief under former section 212(c) of the Act. Relying on a recent decision by the Fifth Circuit, he contends that he detrimentally relied on the availability of section 212(c) relief when he waived appeal following a jury verdict of guilty in his trial for the crime of "lewd and lascivious conduct with a child under sixteen years of age". Because the respondent cannot demonstrate detrimental reliance, his application for section 212(c) relief will be denied.

A. Applicable Law

Former section 212(c) of the Act provides that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not

under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United Stats in the discretion of the Attorney General despite the applicability of certain grounds of exclusion specified in section 212(a). This waiver was expanded to also be available to lawful permanent residents who did not proceed abroad, but risked losing their legal permanent resident status due to charges of deportability or removability. *See Matter of Silva*, 16 I&N Dec. 26 (BIA 1976). However, section 212(c) relief applies only to charges of removability for which there are comparable grounds of inadmissibility. 8 C.F.R. § 1212.3(f)(5); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; A.G. 1991); *see, e.g., Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). Section 212(c) was subsequently repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009, 597 (IIRIRA).

In 2001, the United Stats Supreme Court held that section 212(c) relief remains available to aliens, irrespective of when they were put into proceedings, if their "convictions were obtained through plea agreements [prior to April 1, 1997] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect," *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). Employing the retroactivity analysis formulated in *Landgraf*, the Supreme Court in *St. Cyr*

determined that section 304(b) of IIRIRA, when applied to aliens who had entered into plea agreements in reliance on the availability of such relief, had an impermissible retroactive effect. *Id.* Thus, section 304(b) of IIRIRA could not be applied retroactively in such cases. *Id.*; *see also* 8 C.F.R. §§ 1003.44, 1212.3, 1240.1. In *Carranza-DeSalinas v. Gonzales*, the Fifth Circuit held that section 212(c) relief may be available to individuals who proceeded to trial and that it is not limited to defendants that entered into plea agreements. *Carrantza-DeSalinas*, 477 F.3d 200 (5th Cir. 2007). To be eligible for relief pursuant to former section 212(c), the alien seeking relief must demonstrate that he "detrimentally changed his position in reliance on continued eligibility for § 212(c) relief." *Id.* at 205 (quoting *Hernandez-Castillo v. Moore*, 436 F.3d 516, 520 (5th Cir. 2006)).

B. Respondent's Argument

The respondent argues that he detrimentally relied on the availability of section 212(c) relief when he decided to forego his right to appeal the jury's guilty verdict and accept a "withheld judgment". However, by his own admission he was not deportable or inadmissible at the time of his plea and sentence because the Board's interpretation of "conviction" at that time did not include the respondent's "withheld judgment". The evidence submitted by the respondent makes clear that he waived his right to appeal in reliance on the Board's interpretation of "conviction". *See Matter of Ozkok*, 19 I&N Dec. 546. Although the

respondent may have "changed his position", he did not do so in reliance on continued eligibility for section 212(c) relief. *See Carranza-DeSalinas*, 477 F.3d at 205.

In essence, the respondent's arguement is restatement of his constitutional challenge to the retroactive application of the definition of "conviction", added by IIRIRA in 1996. As explained above, this argument is without merit. Congress has the power to make past activity a ground of removal. *See Moosa*, 171 F.3d at 1009 (citing *Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992) (citations omitted)). At the time of his conviction, he gave up the right to appeal, but he did so in reliance on the Board's jurisprudence on the meaning of "conviction", not the continued availability of section 212(c) relief. As such, he is not eligible for section 212(c) relief. *See Carranza-De Salinas*, 477 F.3d 200; *see also St. Cyr*, 533 U.S. 289.

Respondent has not requested any other form of relief nor does he appear to be eligible for any such relief. Accordingly, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reconsider and terminate proceedings is **DENIED**.

IT IS FURTHER ORDERED that the respondent's request for section 212(c) waiver of inadmissibility be pretermitted and **DENIED**.

IT IS FURTHER ORDERED that respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

Dated: April 13, 2007 /s/ Glenn McPhaul
Glenn P. McPhaul

STATE OF IDAHO)
)
COUNTY OF BLAINE)

BEFORE ME, THE UNDERSIGNED AUTHORITY, DID APPEAR KATHLEEN RIVERS, AND BEING UNDER SOUND MIND DID DEPOSE AND SWEAR AS FOLLOWS:

1. "I am an attorney practicing criminal law in the State of Idaho. I have practiced criminal law in Idaho since 1984. I was the Blaine County Public Defender from 1992 through 1996. In my capacity as Public Defender, I represented Fidel Aguilar-Cintora beginning sometime in 1993.

2. Fidel was charged with Statutory Rape and Lewd and Lascivious Acts in violation of Idaho State law. Fidel pled not guilty.

3. On February 2, 1994, a jury acquitted Fidel on the Statutory Rape charge, but found him guilty of the Lewd and Lascivious Acts count. I spoke with the members of the jury after the trial and they told me that they thought Lewd and Lascivious Conduct was a misdemeanor and that due to the circumstances and factors of the case, they would not have convicted Fidel had they know it was a felony.

4. I was aware that Fidel was a lawful permanent resident alien of the United States when I began my representation for him. I attempted to prevent this criminal offense from causing his deportation from the United

States by speaking with an Idaho attorney, who was also a friend of mine at the time, named Ray Pena. Mr. Pena is Mexican-American and was practicing law in Rupert, Idaho. He represented many Latino clients in criminal cases and I understood that he was very familiar with the consequences of criminal charges on legal residency and deportation.

5. I was told by Mr. Pena that Fidel could avoid deportation from the United States if the judge issued an 'Order Withholding Judgment.'

6. An 'Order Withholding Judgment" is a procedure under Idaho law where the defendant is found guilty, but the court withholds a formal finding of guilt. The court places the defendant on probation and, if the defendant successfully completes the probation, the charge is dismissed as if no charges were ever filed. A defendant does not have to report the charge as a conviction. If the probation is not successfully completed, further proceedings are held.

7. I was specifically told that an 'Order Withholding Judgment' would prevent Fidel's deportation. To the best of my recollection this was confirmed by immigration authorities. I do not specifically recall with whom I spoke but the whole focus of my representation was to posture the case so that Fidel would avoid deportation and so that he could continue to work for his employer in Blaine County.

Fidel was in jail at the time on an immigration hold due to the charges so I was able to have contact with such authorities. It was my practice to not simply accept the representations of one person on such an important issue and to instead, confirm the information with immigration.

8. Based upon the above understanding and information, I advised Fidel that 'Order Withholding Judgment' would prevent his deportation. Since deportation was the single most important issue (he received credit for time served so did not have to serve further jail time after trial), I advised him that he should give up his right to appeal, his right under Idaho Criminal Rule 35 for reconsideration of his sentence, and post-conviction relief. He had a significant appealable issue in the case as, among other things, I had filed a preliminary motion to dismiss for selective prosecution on the basis of race and ethnic discrimination (another recent statutory rape case involving a Caucasian couple was not pursued by the prosecution), which motion was denied.

9. The judge subsequently entered an 'Order Withholding Judgment.' He placed Fidel on probation for five years. Upon completion of his probation, the charges against Fidel were to be dismissed.

10. Based on the Withheld Judgment, the immigration authorities lifted the "hold" and did not deport Fidel. He was released from jail

and went back to work. In contrast, another defendant by the name of Serafino Lopez was charged at the same time as Fidel with an identical crime and under the same circumstances was deported. Mr. Lopez received the same sentence as Fidel but Mr. Lopez was never released from jail because he was in the country illegally. Immigration did not lift the hold on Mr. Lopez and after trial, instead of being released, the immigration authorities immediately deported him.

11. If I had known that the 'Order Withholding Judgment' would not prevent Fidel's deportation, I would have advised him to appeal, filed a Rule 35 motion, sought post-conviction relief, and pursued other remedies that may have been available as I believe the selective prosecution issue was a strong one.

3/6/07 /s/ Kathleen C Rivers
Date Kathleen Rivers

SUBSCRIBED AND SWORN TO ME, THE UNDERSIGNED AUTHORITY, ON THIS THE 6th DAY OF MARCH 2007.

[SEAL] /s/ Christine A. Rolf
Notary Public
Residing @ Hailey, Idaho
Commission Expires 6-15-2011

[Drivers License Omitted In Printing]

[State Bar ID Omitted In Printing]

STATE OF TEXAS)
)
COUNTY OF BEXAR)

BEFORE ME, THE UNDERSIGNED AUTHORITY, DID APPEAR FIDEL AGUILAR-CINTORA, AND BEING UNDER SOUND MIND DID DEPOSE AND SWEAR, THROUGH AN INTERPRETER, AS FOLLOWS:

1. "I first came to the United States sometime in the early 1980s. I received my lawful permanent residence in 1990.

2. Sometimes in 1993, I was charged with rape and lewd and lascivious acts with a minor. I pled not guilty to each charge. I was acquitted of the rape charge, but the jury found me guilty of committing lewd and lascivious acts with a minor.

3. My criminal attorney told me that I could prevent my deportation if I received an 'Order Withholding Judgment.' She told me that to obtain this, I could not appeal my case. Because I did not want to be deported, I agreed to request this order. If I would have known that I would still be deported with the "Order Withholding Judgment," I would have appealed my case.

4. I received an "Order Withholding Judgment" and immigration did not attempt to deport me. Further, I was allowed to re-enter the country repeatedly from 1994 until this last time.

5. I believed that I could reside here permanently, so I applied for my wife and children to come to the United States in 1996. They now live with me in Idaho."

3/12/07	/s/ Fidel Cintora A.
Date	Fidel Aguilar-Cintora

SUBSCRIBED AND SWORN TO ME, THE UNDERSIGNED AUTHORITY, ON THIS THE 12 DAY OF MARCH 2007.

/s/ Laura E. Lozano
Notary Public

[SEAL]	LAURA ELIZA LOZANO NOTARY PUBLIC STATE OF TEXAS COMMISSION EXPIRES: JANUARY 5, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60546

FIDEL AGUILAR CINTORA

Petitioner

v.

PETER D KEISLER,
ACTING U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Nov. 28, 2007)

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Barksdale
United States Circuit Judge

REHG-6a

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No. 07-1116

In the Supreme Court of the United States

FIDEL CINTORA AGUILAR, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of deportation, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies and crimes involving moral turpitude. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) should not be construed to apply to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief under that section. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien found guilty by a jury of a crime involving moral turpitude and who was not subject to deportation at the time he decided not to appeal the jury's finding.

2. Whether Congress's expressly retroactive application of the definition of "conviction" in 8 U.S.C. 1101(a)(48) violated petitioner's due process rights by rendering him deportable on the basis of an offense for which he was not previously deportable.

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In the Supreme Court of the United States

No. 07-1116

FIDEL CINTORA AGUILAR, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The orders of the Board of Immigration Appeals (Pet. App. 2-4) and the immigration judge (Pet. App. 5-13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2007. A petition for rehearing was denied on November 28, 2007 (Pet. App. 20-21). The petition for a writ of certiorari was filed on February 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), au-

thorized permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion, subject to certain exceptions. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply as well to deportation proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies and crimes involving moral turpitude. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277; see also *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of a "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A), 1229b(1)(C).

In IIRIRA, Congress also introduced for the first time a definition of "conviction" for purposes of the INA. Included within that new definition of a "conviction" are some circumstances in which an adjudication of an alien's guilt was technically "withheld" but the alien was found guilty and sentenced to some punishment or penalty. See IIRIRA § 322(a)(1), 110 Stat. 3009-628 (8 U.S.C. 1101(a)(48)(A)). Congress specified that the new definition of conviction would apply to convictions that occurred before IIRIRA's enactment. See IIRIRA § 322(c), 110 Stat. 3009-629 ("The amendments made by

[Section 322(a)] shall apply to convictions and sentences entered *before*, on, or after the date of the enactment of this Act.") (emphasis added).

But Congress was not so specific about whether IIRIRA's repeal of Section 212(c) and replacement with Section 240A should apply to aliens who were convicted prior to the enactment of IIRIRA. In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien who had been convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief under Section 212(c). See 533 U.S. at 314-326; see also *id.* at 318-319 & n.43 (contrasting Congress's "unambiguous[] * * * intention" to apply "specific provisions" of IIRIRA retroactively, including Section 322(a)(1)'s definition of "conviction," with its failure to be so specific about the retroactive effect of its repeal of Section 212(c)). In particular, the Court in *St. Cyr* explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their new convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

2. Petitioner is a native and citizen of Mexico who was admitted to the United States for lawful permanent residence on December 1, 1990. Pet. App. 6. In 1993, he was charged in Idaho state court with raping a 14-year-old girl. *Id.* at 7; Pet. 4. On February 2, 1994, a jury found him guilty of the lesser-included offense of lewd and lascivious conduct with a child under sixteen years of age. Pet. App. 6; Pet. 4. On March 28, 1994, the court entered an "Order Withholding Judgment," pursuant to

which petitioner was placed on supervised probation. Pet. 4-5. Petitioner's attorney later explained that she sought the order withholding judgment in an attempt to prevent petitioner from having a "conviction" that would make him deportable. Pet. App. 15-16. She also claimed that, because petitioner was no longer concerned about deportation, she advised him not to appeal his sentence, and thus did not pursue an argument that he had been subjected to "selective prosecution on the basis of race and ethnic discrimination" when state prosecutors failed to pursue a separate "statutory rape case involving a Caucasian couple." *Id.* at 16. Two years later, Congress added to the INA the definition of "conviction" that specifically included orders like the one withholding judgment in petitioner's criminal case, and Congress expressly made that amendment applicable to convictions entered prior to the enactment of IIRIRA. See pp. 2-3, *supra*.

3. a. In January 2007, when petitioner was returning to the United States from a trip to Mexico, he was arrested at a port of entry in Texas and paroled into the country. Pet. App. 6. The Department of Homeland Security (DHS) commenced removal proceedings, alleging that petitioner is removable because he is an alien who has been convicted of a crime involving moral turpitude. *Ibid.*; see 8 U.S.C. 1182(a)(2)(A)(i)(I).

b. In the removal proceedings, petitioner denied both that he had been convicted of a crime involving moral turpitude and that he is removable. Pet. App. 6. The immigration judge (IJ) found that DHS had proved by clear and convincing evidence that petitioner had been convicted of a crime involving moral turpitude and, therefore, that he was removable as charged. *Id.* at 7.

Petitioner then moved to terminate the proceedings, asking the IJ to reconsider the finding that he had been convicted of a crime involving moral turpitude based on his assertion that the application of IIRIRA's definition of "conviction" to his withheld judgment is manifestly unjust and thus violates due process. Pet. App. 7, 8. Alternatively, petitioner sought a waiver of removal under Section 212(c), alleging that he detrimentally relied on the availability of Section 212(c) relief when he waived his right to appeal the jury verdict finding him guilty of lewd and lascivious conduct with a child under sixteen years of age. *Id.* at 7, 9.

The IJ denied petitioner's motion, ruling that it lacked jurisdiction over the due process claim, and noting that, in any event, similar arguments had already been rejected by the Fifth Circuit. Pet. App. 8-9 (citing *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321 (2004), and *Moosa* v. *INS*, 171 F.3d 994, 1006-1007 (1999)). The IJ also denied petitioner's Section 212(c) application, ruling that, although such relief may be available to criminal aliens who proceeded to trial, *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007), by petitioner's own admission, he was not deportable or inadmissible when he accepted his withheld judgment, because withheld judgments were not then considered "convictions" by the Board of Immigration Appeals (BIA). Pet. App. 11 (citing *In re Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988)). The IJ thus determined that, in choosing not to appeal, petitioner relied on his not being deportable under the BIA's interpretation of "conviction" (which was later abrogated by statute) rather than any expectation that he would be eligible for discretionary relief from deportation under Section 212(c). *Id.* at 12 (citing *Carranza-de Salinas*, *supra*, and *St. Cyr*, 533

U.S. at 289). The IJ ordered petitioner removed to Mexico. *Id.* at 13.

c. The BIA affirmed the IJ's decision, finding that the IJ properly determined that petitioner had a "conviction" for immigration purposes. Pet. App. 2-4. The BIA agreed that Fifth Circuit precedent foreclosed petitioner's due process argument about Congress's retroactive application of IIRIRA's definition of "conviction" and that, in any event, the agency was without jurisdiction to rule on the constitutionality of the statutes and regulations that it administers. *Id.* at 3. Additionally, the BIA agreed with the IJ's denial of petitioner's Section 212(c) application, ruling that his waiver of "his right to appeal to avoid the consequences of having a conviction for immigration purposes does not demonstrate the requisite reliance on the continued availability of section 212(c) relief." *Id.* at 4.

4. The court of appeals summarily affirmed the BIA without opinion in an unpublished per curiam order. Pet. App. 1. The court construed petitioner's subsequent motion for rehearing en banc as a motion to reconsider and denied it in an unpublished per curiam order. *Id.* at 20-21.

ARGUMENT

1. Petitioner contends (Pet. 13-18) that this Court's holding in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved aliens convicted of an aggravated felony after a plea agreement, should be extended to aliens who were found guilty of a deportable offense after a jury trial. He contends that, insofar as it rejected that argument, the Fifth Circuit's summary affirmance of the agency's decision conflicts with this Court's holdings in *St. Cyr* and *Hughes Aircraft Co.* v. *United States ex rel. Schu-*

mer, 520 U.S. 939 (1997), and with the Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185, 1197 (2006). The petition should be denied because the Fifth Circuit's decision is correct. Moreover, this case is not a suitable vehicle for deciding the question presented because—in light of the pre-1996 definition of "conviction"—petitioner had no expectation that he was even deportable. He therefore could not have relied on any expectation that he would be eligible for discretionary relief from deportation under former Section 212(c). Congres has now clearly provided that his conviction does render him deportable. Although petitioner has identified some disagreement among the courts of appeals about whether *St. Cyr*'s reasoning applies to aliens convicted after a jury trial or to aliens who chose not to appeal their convictions, petitioner's pre-IIRIRA lack of a "conviction" renders that disagreement irrelevant to his case.

a. Although its lack of explanation makes it unsuited for this Court's review in any event, the Fifth Circuit's summary affirmance of the agency's decision is correct. As both the BIA and the IJ noted (Pet. App. 4, 11-12), and as petitioner concedes when he states that he accepted the withheld judgment "with the assurance that it would not result in his deportation," Pet. 24, when petitioner decided whether to forgo his right to appeal, he did not subjectively or objectively rely upon the likelihood that he might later receive Section 212(c) relief from deportation. Instead, petitioner accepted the withheld judgment and decided not to appeal because such a judgment was not then deemed a "conviction" for immigration purposes and therefore did not render him deportable at all. Pet. 5; Pet. App. 15-17.

b. Although petitioner has identified a conflict among the circuits about the *type* of reliance that is required under *St. Cyr* to establish a retroactive effect (Pet. 19-23), that conflict is irrelevant to the instant case. The cases petitioner cites to demonstrate the conflict discuss the repeal of Section 212(c) relief, but, as the BIA correctly explained, that repeal had no effect on petitioner's decision not to appeal his sentence or the jury's determination that he was guilty of a crime involving moral turpitude. As petitioner himself concedes (Pet. 24), he gave up his right to appeal *not* in hopes of obtaining Section 212(c) relief from deportation, but in hopes of avoiding a "conviction" that would render him deportable in the first place.

c. Even if this case properly turned on whether the elimination of Section 212(c) relief has a retroactive effect on aliens found guilty "after a jury trial" (Pet. i, 10, 13), the denial of relief would be correct. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial,"

the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

At least seven circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty, precisely because this Court's decision in *St. Cyr* emphasized the showing of reliance provided by a guilty plea. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001); *Zamora* v. *Gonzales*, 240 Fed. Appx. 150, 152-153 (7th Cir. 2007), cert. denied, No. 07-820 (Apr. 21, 2008); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Hem*, 458 F.3d at 1189 (10th Cir. 2006). See also *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431-2432 (2006) (explaining *St. Cyr*'s rationale based on *quid pro quo* arrangement in guilty plea). Only the Third Circuit has held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. *Atkinson* v. *Attorney Gen.*, 479 F.3d 222 (2007).[1]

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[1] Petitioner (at 21) also cites the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004). The retroactivity issue in *Olatunji* involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. In fact, *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which did involve Section 212(c). See *Ola-*

Especially given the great weight of authority in the courts of appeals, an intervening development renders review by this Court unwarranted to consider the question whether *St. Cyr*'s holding applies to aliens convicted after a jury trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA barring Section 212(c) relief apply to aliens convicted at trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the amended regulations, which took effect on October 28, 2004. See *id.* at 57,835 (8 C.F.R. 1212.3(h)) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204 (11th Cir. 2006), and this Court should not be one of the first to do so.

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tunji, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). Even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument—continued to hold that "IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

d. Finally, even if this case turned on the question whether *St. Cyr* should be extended to an alien who has forgone an appeal,[2] review should be denied. Petitioner identifies only one decision that has addressed that issue. See *Hem*, 458 F.3d at 1200 n.5 ("There is no basis for distinguishing between a decision to give up a right to trial in favor of the possibility of immigration relief and a decision to forego [*sic*] the right to appeal in favor of such a possibility."). In *Hem*, the Tenth Circuit found that aliens who give up a right to appeal could establish objective reliance on their Section 212(c) eligibility based on the likelihood that the category of aliens involved would have so relied. This case, however, deals with a class of aliens who were not even "convicted" of offenses that would render them deportable; any reliance on the availability of Section 212(c) relief would not have been objectively reasonable but rather the product of clairvoyance about Congress's subsequent expansion of the definition of "conviction" and its decision to apply that new definition to convictions entered before IIRIRA's date of enactment.

Because the question of reliance in the context of a forgone appeal has been addressed only by the Tenth Circuit, and there was understandably no discussion of the question by the court of appeals in this case, this case presents no occasion for this Court to address the issue.

2. With respect to the second question presented by the petition, petitioner argues that Congress's application of IIRIRA's new definition of "conviction" to his

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[2] As noted above, petitioner's reliance argument, both in the question presented and in much of the sections of the argument associated with it, is directed at his being found guilty of a deportable offense "after a jury trial." Pet. i, 10, 13.

1994 withheld judgment violates his due process rights because it works a "manifest injustice" by rendering him deportable when he would not previously have been. Pet. 24-27. The court of appeals was correct in summarily affirming the agency's decision to the contrary, and further review is unwarranted. Congress expressly made the revised definition of "conviction" applicable to convictions and sentences entered before IIRIRA's enactment date. Moreover, petitioner cites no conflict among the circuits regarding the issue, and this Court has long recognized that Congress has broad authority to make past criminal activity a new ground for deportation.

a. As this Court has previously explained: "[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result." *St. Cyr*, 533 U.S. at 316 (citation omitted). As petitioner concedes, "Congress clearly manifested its intent" that the revised definition of "conviction" in Section 322(a)(1) of IIRIRA would "apply retroactively." Pet. 24; see also Pet. 7 ("Congress * * * expressly made the new definition of 'conviction' retroactive."); *St. Cyr*, 533 U.S. at 318-319 n.43 (including IIRIRA § 322(a) among the "specific provisions" that Congress "indicate[d] unambiguously its intention to apply * * * retroactively"). Cf. *Hughes Aircraft Co.*, 520 U.S. at 946 (noting that the presumption against retroactivity does not apply when "Congress has clearly manifested its intent to the contrary").

b. Petitioner not only fails to cite any court of appeals decision finding Congress's retroactive change to the definition of "conviction" to be unconstitutional. His

attempt to establish that retroactive application of the expanded definition of "conviction" works a "manifest injustice" is also particularly unpersuasive in the immigration context. This Court has repeatedly rejected claims that new laws may not be applied to past conduct to render an alien deportable. In *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957), the Court held that a permanent-resident alien was made deportable under the 1952 version of the INA as a result of a 1925 narcotics conviction. *Id.* at 692-694. The Court explained that "Congress was legislating retrospectively, as it may do," when it specified in 1952 that aliens were to be deportable for narcotics convictions entered at a time when such convictions would not have been a ground for deportation. *Id.* at 694; see also *Lehmann* v. *United States*, 353 U.S. 685, 690 (1957) (holding that an alien was made deportable under the 1952 version of the INA for 1936 convictions for crimes involving moral turpitude); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 584-591 (1952) (rejecting due process challenge to deportation of legally resident aliens although their Communist Party memberships terminated before a 1940 statute made membership a ground for deportation).

c. The cases petitioner cites (Pet. 25-26) do not support any finding of manifest injustice in this case. Most of them refused to decide the constitutional question he raises. In *St. Cyr*, this Court acknowledged that "Congress has the power to enact laws with retrospective effect," and it did not address the "constitutional limits" on that power. 533 U.S. at 316. In *Landon* v. *Plasencia*, 459 U.S. 21 (1982), the Court held that an alien in exclusion proceedings has a right to due process, but it expressly stated that it was *not* deciding "the contours of the process that is due or whether the process accorded

[the alien] was insufficient." *Id.* at 32. Moreover, *Landon*, unlike this case, did not deal with the availability of discretionary relief. Similarly, the Seventh Circuit's decision in *Jideonwo* v. *INS*, 224 F.3d 692 (2000)—which predated *St. Cyr*—recognized that courts "will not ordinarily disturb" Congress's express determinations about retroactivity. *Id.* at 698. Because it found that "Congress's intent with regard to the retroactive application of [the statute in question there was] ambiguous," the Seventh Circuit applied a different standard, asking only whether the statute "attache[d] new legal consequences to past conduct." *Ibid.*

The remaining cases cited by petitioner rejected arguments that retroactive application would violate due process. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20 (1976); *Bradley* v. *School Bd.*, 416 U.S. 696, 721 (1974). In *Bradley*, the Court noted that "the precise category of cases to which [the 'manifest injustice'] exception applies has not been clearly delineated," *id.* at 717, and petitioner cannot extract any criteria to assist his argument here. Even so, because the "manifest injustice" inquiry must consider "the nature and identity of the parties," "the nature of their rights," and "the nature of the impact of the change in law upon those rights," *ibid.*, petitioner has an even greater burden to shoulder than did the mining companies in *Usery* or the school board in *Bradley*. Congress exercises plenary power over immigration and naturalization, see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972) (citing cases), and, as explained above, this Court has previously sustained deportations on the basis of statutes that made pre-enactment conduct a new ground for deportation.

It is not manifestly unjust to conclude that petitioner—an alien who was found guilty by a jury of committing a crime involving moral turpitude but technically had the criminal judgment against him "withheld"—can be removed from the country and is ineligible for discretionary relief from removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

FIDEL CINTORA AGUILAR,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The question presented in this case is whether an alien convicted after a jury trial who gives up his right to appeal in order to avoid deportation may apply for discretionary relief under former Section 212(c). The government concedes that the circuits are in conflict on what kind of pre-IIRIRA reliance on the availability of Section 212(c) relief – if any – must be demonstrated by an alien who now seeks relief under that provision. It also acknowledges that petitioner unquestionably would be entitled to relief in the Third Circuit and, as we show below, aliens in petitioner's position also would prevail in at least two other courts of appeals. And the government does not deny the substantial national importance of the question presented here, which has been addressed dozens of times by the federal courts and immigration judges in recent years. The government accordingly does *not* dispute that the issue here warrants this Court's attention.

Instead, in opposing the petition the government principally contends that "this case is not a suitable vehicle for deciding the question presented" because petitioner relied upon the pre-IIRIRA definition of "conviction," not Section 212(c), in foregoing his appeal. Opp. 7. But this argument is meritless, for two reasons. First, the question in this case is what type of reliance, if any, is required to apply for discretionary relief under Section 212(c), not whether petitioner actually relied on the availability of Section 212(c) relief. That question is squarely presented here. Second, contrary to the government's assertion, petitioner and other aliens in his position plainly would have "objectively" relied on the availability of relief under Section 212(c). This case therefore is

an entirely suitable vehicle with which to resolve the acknowledged conflict in the circuits and, if the Court concludes that the "objective reliance" standard is appropriate, with which to provide guidance on the nature of that standard.

The government further contends certiorari should be denied because a regulation issued in 2004 bears on the question presented. But most of the decisions contributing to the circuit conflict *post-date* the regulation. There is no reason to believe that any court will reconsider its position on this basis. The government provides no explanation as to how the regulation could affect the disagreement among the circuits.

The government's defense of the retroactive application of IIRIRA's definition of conviction is also incorrect. Retroactively applying the revised definition fails this Court's heightened rationality requirement. Indeed, the government's concession that petitioner relied on the pre-IIRIRA definition of "conviction" in abandoning his appeal (Opp. 7-8) confirms that the decision below cannot be squared with the most "elementary considerations of fairness." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994).

I. This Case Squarely Presents The Acknowledged Conflict Over Whether An Alien Must Show Actual, Objective, Or No Reliance On Section 212(c).

As the government concedes, "petitioner has identified a conflict among the circuits about the *type* of reliance that is required under [*INS* v. *St. Cyr*, 533 U.S. 289 (2001)] to establish a retroactive effect." Opp. 8 (emphasis in original). There is no denying

the scope or severity of this conflict, or that its resolution is essential to ensure the uniform application of federal immigration law.

A. The courts of appeals are divided over the role of reliance when determining whether Section 212(c) is impermissibly retroactive.

1. Three courts of appeals, including the court below, require a showing of actual reliance on the availability of Section 212(c) in order to grant relief under that provision. See *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) ("There needs to be an individualized showing to ensure us that an application of IIRIRA that forestalls 212(c) relief is impermissibly retroactive."); *Carranza-De Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) ("If, however, Carranza can demonstrate on remand that she affirmatively decided to postpone her [Section] 212(c) application to increase her likelihood of relief, then she has * * * established a reasonable 'reliance interest' in the future availability of [Section] 212(c) relief comparable to that of the applicants in *St. Cyr* and she is entitled to make her application for relief."); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001).

2. In contrast, at least two other courts of appeals have adopted an "objective reliance" standard. One of them, the Tenth Circuit, has expressly "disagree[d] with" the "actual reliance" courts. *Hem* v. *Maurer*, 458 F.3d 1185, 1187 (10th Cir. 2006). It instead employs an "objectively reasonable reliance" inquiry, which "generalize[s] a category of affected aliens from the facts of the case" and then asks whether the conduct of those aliens could "have reasonably been motivated by the availability of [Section] 212(c) relief." *Id.* at 1199. Thus "a defendant

who proceeds to trial but forgoes his right to appeal when [Section] 212(c) relief was potentially available has suffered retroactive effects under IIRIRA." *Id.* at 1187. The Sixth Circuit has adopted the same standard. *Thaqi* v. *Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) ("[U]nder *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for [Section] 212(c) relief.").

3. Unlike these courts, the Third Circuit holds that the repeal of Section 212(c) has an impermissible retroactive effect even in the absence of either actual or objective reliance. See *Atkinson* v. *Att'y Gen.*, 479 F.3d 222, 227 (3d Cir. 2007) ("[T]he question is whether [the statute] attaches new legal consequences to past events * * *. The Court has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively.").

B. This case is an appropriate vehicle for resolving the question presented.

Although the government concedes the existence of the conflict, it insists that the "conflict is irrelevant to the instant case" (Opp. 8) because petitioner relied on the pre-1996 definition of "conviction" in foregoing his appeal and therefore "did not subjectively or objectively rely upon the likelihood that he might later receive Section 212(c) relief from deportation." Opp. 7. That contention is wrong.

In fact, the government goes astray in two respects: it ignores both the nature of the conflict in the courts of appeals and the character of "objective

reliance." As is shown above, the legal question here is not whether petitioner *actually relied* on the availability of Section 212(c); it is whether actual reliance is required *at all*. Even if the government is correct that petitioner did not actually rely on the availability of Section 212(c), this case would still be resolved differently in the circuits that require no reliance or only "objective reliance."

Had petitioner attempted to reenter the United States in the Third Circuit – a "no reliance" jurisdiction – rather than the Fifth Circuit, the government concedes that he would have been permitted to apply for Section 212(c) relief. Opp. 9. In the Third Circuit, the operative question is simply whether "applying IIRIRA to eliminate the availability of discretionary relief under former Section 212(c) attach[es] new legal consequences to events completed before the repeal." *Atkinson*, 479 F.3d at 230. As in *Atkinson*, this case involves new "legal consequences" to events that "occurred in the past and cannot be changed." *Ibid.* The Third Circuit would therefore conclude that petitioner is eligible for Section 212(c) relief.

Similarly, had petitioner's case arisen in an "objective reliance" jurisdiction, he would be eligible for discretionary relief under former Section 212(c). Like the Tenth Circuit's decision in *Hem*, this case involves an alien "who proceeds to trial but forgoes his right to appeal when [Section] 212(c) relief was potentially available * * *." *Hem*, 458 F.3d at 1187. To be sure, petitioner here also relied upon the pre-IIRIRA definition of "conviction." But, contrary to the government's assertion, there is no reason why petitioner could not have "reasonably relied" upon *both* the definition of "conviction" *and* the availabili-

ty of Section 212(c) as a backstop in the event Congress expanded the definition of "conviction." See *United States* v. *Leon-Paz*, 340 F.3d 1003, 1006-07 (9th Cir. 2003) (holding alien entitled to Section 212(c) relief because he could legitimately rely on *both* the fact that his conviction did not initially render him deportable *and* on the availability of Section 212(c) relief should the class of deportable offenses change). *Cf. Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190 (9th Cir. 2006).

In this regard, the government is wrong in contending that petitioner could not have relied upon the availability of Section 212(c) relief because any reliance would have been "the product of clairvoyance about Congress's subsequent expansion of the definition of 'conviction' * * *." Opp. 11. Whether the pre-IIRIRA definition of conviction encompassed orders withholding judgment was not clear at the time of petitioner's Idaho conviction. Prior to IIRIRA, what constituted a "conviction" for immigration purposes was a "source of much debate." *Griffiths* v. *INS*, 243 F.3d 45, 49 (1st Cir. 2001). The trend in that debate, moreover, reflected "a consistent broadening of the meaning of 'conviction.'" *Saleh* v. *Gonzales*, 495 F.3d 17, 23 (2d Cir. 2007). In 1988, the BIA, as part of its ongoing attempt "to reconcile its definition of a final conviction with the evolving criminal procedures created by the various states," attempted to classify at least some deferred adjudications as convictions. *Matter of Ozkok*, 19 I. & N. Dec. 546, 550 (BIA 1988). Whether a withheld adjudication of guilt would qualify as a conviction, however, would depend upon "examination of the specific procedure used and the state authority under which the court acted." *Id.* at 551. Compare *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990)

(holding that Texas deferred adjudication process did not constitute a conviction for immigration purposes), with *Chong* v. *INS*, 890 F.2d 284 (11th Cir. 1989) (Florida procedure of withholding adjudication of guilt and imposition of sentence but placement of defendant on probation was "conviction" for immigration purposes). The BIA's definition "failed to produce the desired uniformity." *Herrera-Inirio* v. *INS*, 208 F.3d 299, 305 (1st Cir. 2000).

Against this backdrop of expansion and confusion, it would have been entirely reasonable for petitioner and others similarly situated to rely on the availability of relief under former Section 212(c) in the quite foreseeable event that the courts or Congress would further alter the definition of "conviction." Indeed, the government's contrary contention suggests that this is an *especially* suitable case for review because it would give the Court an opportunity to provide guidance on the meaning of "objective reliance" if it were to hold that to be the controlling standard.[1]

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[1] In opposing review, the government maintains that "[a]t least seven circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty." Opp. 9. If the government means by this to suggest that these courts have categorically denied relief to aliens who have gone to trial even in the presence of actual or objective reliance, it is wrong. Indeed, one of the decisions it cites for its assertion is *Hem*, which at the cited page held that "litigants who proceed to trial but abandon their right to appeal when [S]ection 212(c) relief is available have objectively relied on pre-IIRIRA law." 458 F.3d at 1189. The other decisions cited by the government involved situations where, from all that appears in the opinions, the aliens took *no* action that could have relied on pre-IIRIRA law. See, *e.g.*, *Diaz* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Mbea* v. *Gonzales*, 482 F.3d 276,

II. This Case Involves A Frequently Recurring Issue Of Substantial National Importance.

The government does not dispute that the courts of appeals' conflicting holdings present an issue of substantial national importance that potentially affects thousands of aliens who have been convicted of criminal offenses. The question presented is litigated frequently in cases before the courts of appeals, the federal district courts, and the Board of Immigration Appeals.

1. Over 95,000 aliens convicted of criminal offenses were deported in 2006. See U.S. Dep't of Homeland Sec., Immigration Enforcement Actions: 2006, at 4 tbl. 4 (2008). More were involved in deportation proceedings but had not yet been ordered removed. Many of these aliens with pre-IIRIRA convictions would be eligible for discretionary relief under former Section 212(c) if the "no reliance" or "objective reliance" standards govern. This issue therefore is of pressing importance for a vast number of aliens who have been convicted of criminal offenses.

2. The considerable judicial attention to this issue confirms the importance of the question presented. In the last seven years, the federal courts of appeals have decided dozens of cases that turn on resolution of the question presented. In addition to the cases discussed above, see, *e.g.*, *Ibanez* v. *Att'y Gen.*, 2008 WL 744211 (11th Cir. 2008); *Zamora* v. *Gonzales*, 240 Fed. Appx. 150 (7th Cir. 2007); *Cerbacio-Diaz* v. *Gonzales*, 234 Fed. Appx. 583 (9th Cir. 2007). The federal district courts have also frequently addressed the question presented on habeas re-

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281-82 (4th Cir. 2007); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002).

view or during criminal trials for unlawful reentry, highlighting the variety of contexts in which this issue arises. See, *e.g.*, *United States* v. *Garcia*, 2007 WL 2410061 (S.D. Cal. Aug. 21, 2007); *Esogbue* v. *Ashcroft*, 2005 WL 767884 (E.D. La. 2005). And the Board of Immigration Appeals often addresses such cases, resolving at least 28 of them in the last seven years. See, *e.g.*, *Matter of Everton Alphonso McKenzie*, 2008 WL 762758 (BIA 2008); *Matter of Espiridon Escalante*, 2008 WL 762733 (BIA 2008); *Matter of Juan Angel Garza-Garcia*, 2007 WL 3318644 (BIA 2007). The frequency with which the issue arises, and the profound importance of the issue to the persons affected, makes national uniformity here especially important.

III. The Department Of Justice's 2004 Regulation Provides No Basis For Denying Review.

In an attempt to escape the conflict in the circuits, the government contends that what it characterizes as an "intervening development" – a 2004 regulation denying relief under *St. Cyr* to aliens with convictions entered after trial – renders this case unfit for review. Opp. 10. That contention is mistaken. The government does not and cannot explain why this regulation would affect the decisions in the lower courts. This Court has made clear that "the anti-retroactivity principle finds expression in several provisions of our Constitution." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). Because the "canon of constitutional avoidance trumps *Chevron* deference," *Nat'l Mining Ass'n* v. *Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (citing *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades*, 485 U.S. 568, 574-77 (1988)), there is no rea-

son that the regulation would undo the results reached by the various circuits.[2]

In any event, a large number of cases on all sides of the circuit split hav e been decided *after* the regulation was issued on September 28, 2004. Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (Sept. 28, 2004). Having adjudicated the issue already in wake of this regulation, there is no reason to believe that these courts will change course.

IV. Retroactive Application Of The Definition Of Conviction Violates Due Process.

Review is also warranted to address the retroactive definition of "conviction" created by IIRIRA's Section 322(a)(1). Pet. 24-27. While the government alleges that this Court has "rejected claims that new laws may not be applied to past conduct to render an alien deportable" (Opp. 13), the decisions it cites for this proposition pre-date the heightened rationality requirement this Court has applied to retroactive statutes.[3] See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring) (the con-

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[2] It is true, as the government notes, that "[o]nly a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial." Opp. 10. But that is because the many courts that have resolved the question presented here after issuance of the regulation have recognized that it has no bearing on the issue.

[3] In fact, two of the authorities the government cites, *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957) and *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685 (1950), are inapposite because the statutes were not challenged on due process grounds at all.

stitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation") (citing *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)). The Court has since confirmed that "elementary considerations of fairness * * * dictate that individuals have an opportunity to know what the law is and conform their conduct accordingly," *Landgraf*, 511 U.S. at 265.

Moreover, retroactive application of Section 322 constitutes a "manifest injustice" imposed on petitioner in violation of due process. *Bradley* v. *Sch. Bd. of City of Richmond*, 416 U.S. 696, 716 (1974). The point is made clear by the government's own presentation of the case. It argues that petitioner is foreclosed from Section 212(c) relief because, at the time he accepted the order withholding judgment, that order "*was not then deemed a 'conviction'* for immigration purposes and therefore did not render him deportable at all." Opp. 7 (emphasis added). But at the same time, the government contends that petitioner is presently subject to deportation precisely because the order withholding judgment *is now considered a "conviction"* by virtue of Section 322. Opp. 4; Pet. App. 8. Moreover, the government *concedes* that petitioner actually relied on pre-IIRIRA law when he entered the order withholding judgment. Opp. 7-8 (petitioner "gave up his right to appeal * * * in hopes of avoiding a 'conviction' that would render him deportable"). This is the "manifest injustice" (Pet. 24) of which we complain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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